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No. 820

In the Supreme Court

of the

United States

October Term, 1967

Thrifty Shoppers Scrip Co., *Appellant*

v.

United States of America, Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co.

On Appeal from the United States District Court
for the Central District of California

Jurisdictional Statement

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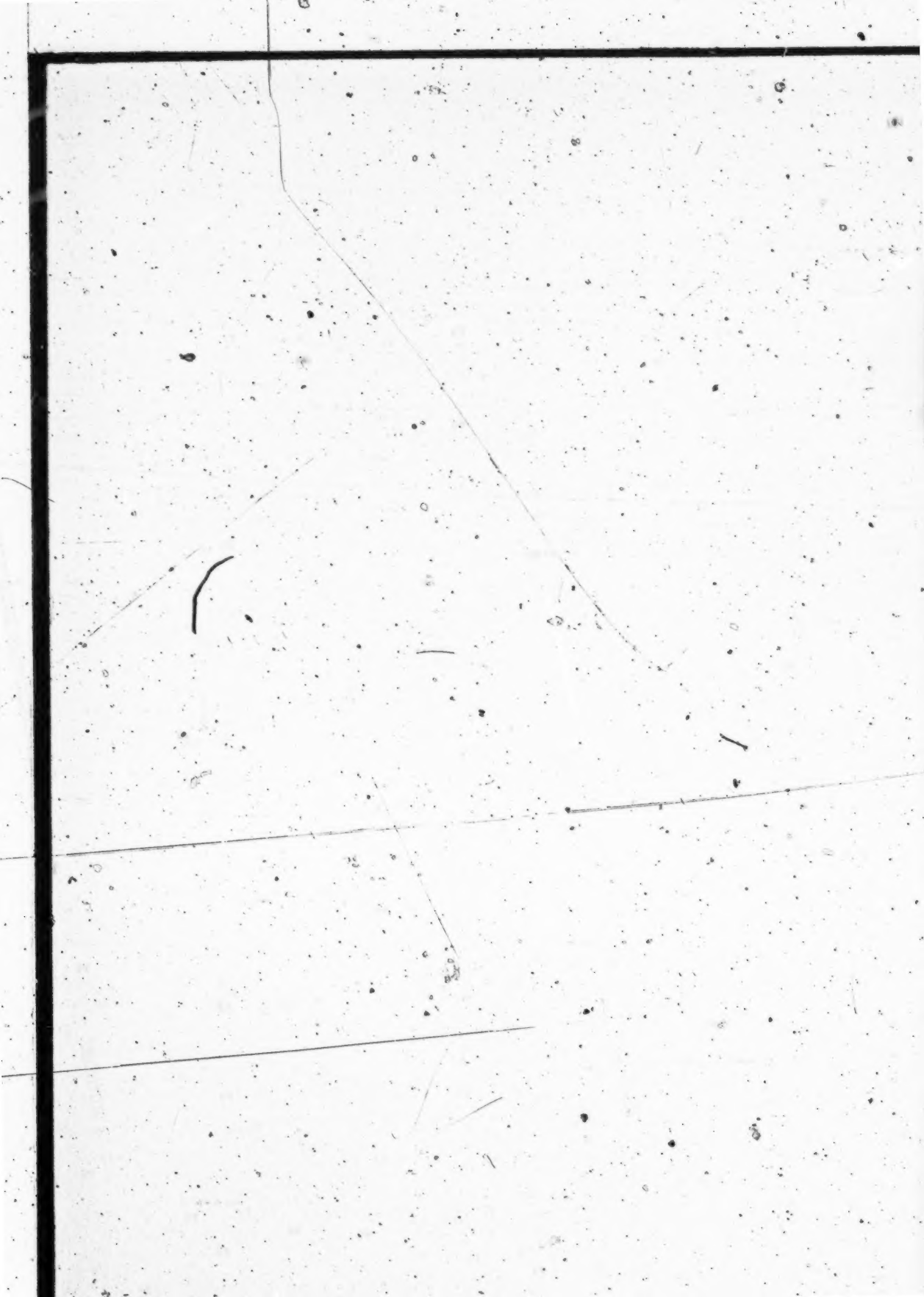

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
(1) Description of Thrifty Shoppers	3
(2) The complaint	4
(3) Proceedings subsequent to the complaint	6
The questions are substantial	15
Conclusion	28
Appendix A—Opinion of district court, filed August 18, 1967	App. 1
Appendix B—Order of district court, entered August 3, 1967	App. 19
Appendix C—Final judgment of district court, entered June 5, 1967, as lodged April 28, 1967, with copy of outlines of alternative reorganization plans and copy of letters with respect thereto to be lodged with proposed final judgment	App. 23
Appendix D—Sections 1, 2 and 4 of Sherman Act	App. 47
Appendix E—Rule 24 of Federal Rules of Civil Procedure	App. 47
Appendix F—Section 2 of Expediting Act of February 11, 1903	App. 48

TABLE OF AUTHORITIES CITED

Cases	Pages
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129	2, 19, 20, 24, 27
International Boxing Club of N.Y. v. United States, 358 U.S. 242 (1959)	17
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)	22
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502	2, 20
Purity Stores, Inc. v. Blue Chip Stamp Company, 1963 Trade Cas. ¶ 70,895 (N.D.Cal. 1963)	10, 27
Sam Fox Publishing Company v. United States, 366 U.S. 683 (1961)	20
United States v. Crescent Amusement Co., 323 U.S. 173 (1944)	23
United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961)	22, 24, 25, 27
United States v. Grinnell Corp., 384 U.S. 563 (1966)	16
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	22
United States v. Sealy, Inc., ... U.S. ....., decided June 12, 1967, 1967 Trade Cas., ¶ 72,125	15
United States v. Von's Grocery Company, 233 F.Supp. 976 (S.D. Cal. 1964)	4

Statutes	
Expediting Act, Section 2, 32 Stat. 823, as amended 15 U.S.C. 29	2, 3
Federal Rules of Civil Procedure, Rule 24	1, 3, 18, 19
Sherman Act:	
Section 4, 15 U.S.C. 4	2, 3
Sections 1 and 2, 15 U.S.C. 1 and 2	2, 3
28 U.S.C. § 2718 App.	3

Text	
Barron & Holtzoff, Fed. Prac. & Pro., Vol. 2, ¶ 594	20

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Jurisdictional Statement

Appellant Thrifty Shoppers Scrip Co., hereinafter referred to as Thrifty Shoppers, appeals from the order of the United States District Court for the Central District of California entered in *United States of America v. Blue Chip Stamp Company et al.* on August 3, 1967, which, *inter alia*, denied Thrifty Shoppers' motion filed on July 12, 1967 (a) to intervene under Rule 24 of the Federal Rules of Civil Procedure and (b) for an order vacating the final judgment entered on June 5, 1967. Thrifty Shoppers also appeals from the final judgment entered below on June 5, 1967. Appellant

submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Central District of California, filed on August 18, 1967, has not been officially reported. Copies of the opinion, the order entered on August 3, 1967, and the final judgment entered on June 5, 1967, are attached hereto as Appendices A, B and C.

JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. 4, to abate violations of Sections 1 and 2 of the Act, 15 U.S.C. 1 and 2.

The final judgment of the district court was entered on June 5, 1967. The order denying Thrifty Shoppers' motion to intervene and to vacate the judgment was entered by the district court on August 3, 1967. The notice of appeal was filed in that court on August 4, 1967. The jurisdiction of the Supreme Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129; *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502.

QUESTIONS PRESENTED

Where the Government has brought an action challenging the legality under the antitrust laws of a monopolistic combination by a group of competing retail grocery chains doing more than $1,500,000,000 annual business in California that have jointly created and operated a trading stamp company for the purpose and with the effect of eliminating competition and achieving a monopoly in the trading stamp market,

and a consent judgment has been entered which will have the effect of preserving such monopoly and which does not put an end to the combination or deprive the defendants of the benefits of their illegal conduct:

(a) May a competing trading stamp company whose existence is threatened by said monopoly be denied the right to intervene in said action for the purpose of seeking to set aside and of appealing from the judgment so entered?

(b) Was the district judge justified in entering such judgment because he considered that it was necessary to do so in order to preserve competition in another line of commerce, namely, the retail grocery industry, and should such judgment be allowed to stand?

STATUTES INVOLVED

Sections 1, 2, and 4 of the Sherman Act, 15 U.S.C. 1, 2 and 4, are attached hereto in pertinent part as Appendix D. Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following § 2718, is attached hereto as Appendix E. Section 2 of the Expediting Act of February 11, 1903, 15 U.S.C. 29, is attached hereto as Appendix F.

STATEMENT

(1) Description of Thrifty Shoppers

Thrifty Shoppers has been engaged in the trading stamp business in California since prior to World War II. The volume of its business, which amounted to $1,364,426 in 1955, before the formation of Blue Chip, fell to $725,813 in 1963. (See plaintiff's answers to defendant Thriftimart's interrogatories pursuant to court's order of July 7, 1966, filed August 3, 1966, answer to interrogatory No. 2 a through d, pp. 16-17.) On April 25, 1967, it instituted a private treble damage action against the defendants herein. In its complaint, Thrifty Shoppers prayed, among other things, that each of the defendant retailers be required to divest itself

of ownership of all stock in Blue Chip and that Blue Chip be enjoined from issuing any trading stamps to any of the defendant retailers.

(2) The complaint

The Government's complaint, filed on December 26, 1963, alleged that eight large retail grocery chains in California and the largest chain of retail pharmacies in the state had been engaged since 1955 in a conspiracy in restraint of trade both in the retail grocery business and in the trading stamp business and that these defendants had conspired to monopolize, had attempted to monopolize and had monopolized the trading stamp business in California in violation of Sections 1 and 2 of the Sherman Act. The complaint alleged that the defendant grocery chains in 1962 did about $815,000,000 in sales in the Los Angeles area* and about $1,597,000,000 in sales in California, which represented 51 percent of all sales made by chain grocery stores in the Los Angeles area and approximately 37 percent of all sales made by such stores in California.

The complaint alleged that the defendants carried out their conspiracy by organizing the defendant Blue Chip Stamp Company as a trading stamp company in 1956 and by maintaining control of the stock of the company, of its board of directors and of its policies and practices. The terms of the conspiracy alleged by the Government were,

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*In *United States v. Von's Grocery Company*, 233 F.Supp. 976, 980 (S.D. Cal. 1964), the district court's decision included a table listing the nine leading grocery chains in Los Angeles in 1958, after giving effect to the merger of Shopping Bag Food Stores into Von's. Of these, the leading five—accounting for total sales of 650 million dollars and 32.1 percent of the market—are defendants herein. Their individual rank and share of the market were as follows: 1. Von's-Shopping Bag, 8.9 percent; 2. Safeway, 8 percent; 3. Ralphs, 6.4 percent; 4. Market Basket, 4.4 percent; 5. Thriftimart, 4.4 percent.

among others, that the defendant retailers would use no trading stamp in any area in California except by agreement and that they would then use Blue Chip; that they would boycott all trading stamp companies other than Blue Chip; that the defendants and co-conspirators would cause the Blue Chip stamp service to be sold at or about cost to prevent other trading stamp companies from effectively competing with Blue Chip; that the use of Blue Chip stamps would be licensed to any retailer in the area of Blue Chip's operation but only on condition that the retailer would use Blue Chip stamps exclusively; that competition among the defendant supermarkets, and between the defendants and other retailers, in the use of trading stamps would be eliminated; and that the defendants would take whatever additional action that was necessary to achieve and maintain a monopoly position in the trading stamp business in California.

The complaint further alleged that Blue Chip stamps were introduced into the Los Angeles area in January, 1960, and that by 1962 Blue Chip was doing about $43,000,000 business in that area, representing approximately 81 percent of all trading stamps issued in the Los Angeles area. In the same year, the complaint alleged, Blue Chip was doing approximately $70,000,000 business in California, representing approximately 71 percent of all trading stamps issued in the state.

In 1956, the complaint alleged, there were approximately 53 trading stamp companies doing business in California, and, of these, 40 were out of business at the time that the Government sued.

In its prayer for relief, the Government, in addition to seeking injunctive relief against the monopolistic conspiracy, asked that each of the defendant retailers be required to divest itself of all of its stock in Blue Chip and that it be

required to cease issuing Blue Chip stamps to its customers.

On December 15, 1966, in giving his reasons for his refusal to sign a consent judgment earlier submitted to him in this action, the district judge informed the parties of the weight he would accord to the allegations of the Government's complaint in his determination of the terms of the final judgment by consent he would enter:

> "In deciding whether or not to decide to sign the proposed consent decree, I have to take as an established fact the allegations contained in the Complaint, and for the purposes of my discussion this afternoon I will accept as being conclusively proved the allegations of the Government concerning all of the defendants who are before the court." (Tr., December 15, 1966, p. 401).

(3) Proceedings subsequent to the complaint

Defendants filed their answers in March and April, 1964. Between May, 1964, and September, 1966, the parties engaged in pre-trial discovery proceedings. The Government served upon defendants three sets of interrogatories and five requests for admissions. In addition, the Government responded to interrogatories propounded by defendants. The following are among the facts adduced in the course of discovery:

Blue Chip Stamp Company was incorporated in May, 1956, by competing grocery chains in California, most of whom primarily were doing business in the Los Angeles area. The incorporators were officials of the defendants Thriftimart, Inc.*, Ralphs Grocery Company, Von's Grocery Company, Market Basket, Alexander's Markets, Safeway Stores, Incorporated, and Purity Stores, Inc., along with an official of Shopping Bag Food Stores (acquired

*Immediately prior to the formation of Blue Chip, Roger M. Laverty, Thriftimart's representative as an incorporator and original member of the board of directors of Blue Chip, said to a

by Von's in 1960) and officials of three other grocery chains. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answer to statement No. 25, and answers of Blue Chip to plaintiff's second request for admissions, filed November 16, 1964, answer to statement No. 20.)

In the "Offering Circular" issued by Blue Chip Stamp Company in June, 1956, with respect to the issuance of its stock, Blue Chip stated that it was the belief of the organizers of Blue Chip that the distribution of trading stamps, particularly by food markets, "is detrimental to the merchants, their customers and suppliers" and that "purchasers of the Company's shares should not regard the shares as an investment upon which they are likely to receive any substantial monetary return." (See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965, answer to statement No. 10.)

Blue Chip was authorized by its Articles of Incorporation to issue two classes of stock, Class A and Class B. The holders of Class A shares, voting separately as a class, were entitled to elect nine of the eleven directors and the holders of the Class B shares, voting separately as a class, were entitled to elect the remaining two directors. Throughout fiscal years 1957-63 and on February 1, 1964, Class A shares were owned by the nine defendant retailers (along with Shopping Bag, until it was acquired by Von's, and, until 1959, by Alpha Beta Food Markets, Inc., which withdrew from Blue Chip and sold its stock to certain of the

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meeting of grocers on or about April 10, 1956, that he had called the meeting with the consent of a committee formed by eight of the leading food chains in Los Angeles and that: "We are forming an organization for the purpose of eliminating trading stamps as we feel they are a parasite in the food industry." (See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 43, pp. 138-139.)

defendants), and from June 30, 1956, to February 1, 1964, officials of all retailer defendants sat on Blue Chip's board, except for brief time periods as to three retailer defendants. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answers to statements Nos. 24 and 25, and answers of Blue Chip to plaintiff's second request for admissions, filed November 16, 1964, answers to statements Nos. 21 and 22.)

The total retail sales of the defendant chains which owned the Class A stock of Blue Chip, at the time of the formation of the joint venture and in 1963 (subject to immaterial variations), were as follows:

Year	Sales in California	Sales in Los Angeles and Orange Counties
1956	$1,083,154,885	$584,238,267
1963	1,864,525,581	984,439,038

(See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965, answer to statement No. 9.)

Blue Chip did not expand its area of operations into the Los Angeles area until January 4, 1960, when it did so pursuant to a resolution of its board of directors adopted on September 15, 1959. At that time, Blue Chip's operations were conducted pursuant to the following resolution adopted by its board of directors on May 18, 1956:

> RESOLVED that trading stamps issued by this corporation shall not be issued in any area unless authorized by resolution adopted by the affirmative vote of not less than eight directors of this corporation.

At an earlier meeting of the board of directors held October 4, 1956, a resolution which would have authorized issuance of Blue Chip stamps in the Los Angeles area after January 1, 1957, had been defeated. (See answers of Blue

Chip to plaintiff's second request for admissions, filed November 16, 1964, answers to statements Nos. 23 and 33, and plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 36A and 36B, at p. 119.)

The growth of Blue Chip following its entry into the Los Angeles area in January, 1960, is evidenced by the fact that Blue Chip sales increased from $10,001,027 for the fiscal year ended June 30, 1959, to $80,916,287 for the fiscal year ended February 28, 1966, and that during the same period the number of trading stamps issued by Blue Chip increased from 5,686,250,000 to 51,100,722,200. (See answers of Blue Chip to plaintiff's first request for admissions, filed June 5, 1964, answers to statements Nos. 7 and 9, and answers of Blue Chip to plaintiff's second set of interrogatories, filed May 10, 1966, answers to interrogatories Nos. 3, 4, 5 and 6.)

On the basis of information supplied to the Government by Blue Chip and by other trading stamp companies and information supplied to the Director of the California State Division of Corporations pursuant to the California Trading Stamp Act of 1961, the Government, in response to interrogatories propounded by defendant Thriftimart, estimated that Blue Chip accounted for the following percentages of stamp service sales and of stamps issued in the California and Los Angeles area markets in 1964:

	Percent of Trading Stamp Market
California	
Stamp service sales by Blue Chip in dollars	66.5 percent
Number of stamps issued by Blue Chip	76.2 percent
Los Angeles Area	
Stamp service sales by Blue Chip in dollars	79.8 percent
Number of stamps issued by Blue Chip	86.4 percent

(See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 1 F, pp. 5-8.)

The extent to which Blue Chip defendant stockholders participated in the use of Blue Chip was as follows in 1965-1966:

Defendant Retailer	No. of Blue Chip Stamps Issued	Amount Paid to Blue Chip
1. Alexander's Market	231,550,000	$ 352,571
2. Lucky Stores, Inc.	1,193,080,000	1,847,370
3. Market Basket	1,182,300,000	1,800,582
4. Purity Stores, Inc.	1,239,000,000	1,916,175
5. Ralphs Grocery Co.	1,313,460,000	2,000,053
6. Safeway Stores, Inc.	6,514,735,000	10,034,262
7. Thriftimart, Inc.	1,515,010,000	2,331,826
8. Von's Grocery Co.	2,344,275,000	3,570,459
9. Thrifty Drug Stores Co. Inc.	1,590,965,000	2,465,996

These totals represent 33.5 percent of all of the stamps issued by Blue Chip during the 1965-66 fiscal period and 32 percent of all Blue Chip stamp revenues in California.

(See answers of Blue Chip to plaintiff's second set of interrogatories, filed May 10, 1966, answer to interrogatory No. 11.)

A majority of Blue Chip's business has been done with large chain grocery and drug stores, including the retailer defendants. As of March, 1964, twenty-five organizations accounted for approximately 54 percent of Blue Chip's business. The remaining share of the business was divided among 12,451 other customers. (See answers of Blue Chip to plaintiff's third request for admissions, filed October 4, 1965; answers to statements Nos. 1, 2, 3 and 4.)

In addition to facts brought to light in discovery, it should be noted that in *Purity Stores, Inc., v. Blue Chip Stamp Company*, 1963 Trade Cas. ¶70,895 (N.D.Cal. 1963), an action brought in 1963 by Purity, a defendant in this case, to prevent Blue Chip from cutting it off because

Purity had chosen to vary the rate at which it issued Blue Chip stamps to its customers, the trial court found that Blue Chip was the dominant trading stamp company in Northern California, "having in excess of 75% of the trading stamp business." (Finding of Fact No. 7).

Between early 1965 and July 22, 1966, the parties engaged in settlement negotiations. On July 22, 1966, the parties, with the exception of Thriftimart, Inc., and Market Basket, filed a stipulation consenting to the entry of a final judgment. Among other things, this judgment required Blue Chip to cease issuing stamps and to create two new stamp companies by March 1, 1969, one of which was to take over the Blue Chip business in Northern California and the other in Southern California. Neither of these companies was to be permitted to use the name "Blue Chip". If, during a designated period, either new company distributed for use in retail stores in its market "trading stamps which convert to 30% or more of the retail food store sales in that area" the court could impose certain prescribed restrictions on issuance of stamps for a period of one year. On October 3, 1966, the Government withdrew its consent to this proposed judgment.

On October 28, 1966, the parties, again with the exception of defendants Thriftimart, Inc., and Market Basket, entered into and filed a stipulation agreeing to the entry of a revised consent judgment. This decree was essentially identical to the original consent judgment, except that it provided for the creation of a single new company rather than two.

On December 15, 1966, the district judge announced after oral argument that he was not going to sign this decree. *In so doing, he set forth certain provisions which he considered should be included in any judgment entered by him.* These included preservation of the right of the company to use the name "Blue Chip", the right of the company to

retain present management, a provision that the company should be one operated for profit, elimination of any provision for a "rollback" in the volume of business done by Blue Chip with retail grocers and the submission in two or three years of a plan for the sale of one-third of Blue Chip's business. (Tr., December 15, 1966, pp. 404-408). The district judge, in setting forth the terms upon which he considered that a sale should be made, recognized that there might ultimately be no divestment, saying: "It is entirely possible that nobody would ever buy under those terms and conditions * * *." (Tr., December 15, 1966, p. 407).*

On April 28, 1967, the parties entered into and filed a third stipulation consenting to the entry of a final judgment. Under this proposed decree, the trading stamp company was permitted to retain the name "Blue Chip". The defendants were to present to the court within sixty days a plan for the reorganization of Blue Chip which was to be substantially in accordance with either of two plans which had been previously furnished to the Government by defendants. Under each plan, the stock in Blue Chip was to be reclassified and issued as follows: 45 percent of the stock to present shareholders (about 90 percent of which stock—or 40.5 percent of all stock—would go to retailer defendants in this action); approximately 42.5 percent to retailers who had used Blue Chip since March 1, 1964, their right to purchase stock being tied to the pur-

*The possibility that no one would buy this one-third of the Blue Chip business exists, among other reasons, because Blue Chip would be permitted to come back into the area in one year and to solicit retailers it had only recently given up as accounts and among those retailers there would be large numbers who would themselves be holders of Blue Chip stock and debentures. Another deterring factor would be the requirement that whoever purchases the divested business must agree to engage in the trading stamp business for a reasonable time.

chase by them of Blue Chip debentures; approximately 2.5 percent to the public; and 10 percent to existing management. Since 80 percent of the stock going to management was to be reserved for issuance to employees over a period of years, under a stock option plan, the percentages of stock in the hands of retailer defendants would necessarily be in excess of the 40.5 percent referred to above for a considerable number of years. Further, during the crucial initial period of reorganization, defendants' share would be increased even more to the extent that users failed to exercise their rights to purchase stock and debentures. (Under the plan of reorganization as ultimately submitted to the court on August 3, 1967, and approved by the court on August 31, 1967, 621,600 shares of the authorized capitalization of 1,400,000 shares would be offered to present shareholders, 621,600 shares would be offered to other retailers who have used Blue Chip (their right to purchase stock being tied to their purchases of Blue Chip debentures), 27,600 shares would be offered to management and 110,400 shares would be made available to key employees over a period of years. No shares would be offered to the public at the time of reorganization. The court's order of August 31, 1967, provided that when permanent directors are ultimately elected they are then to present a plan for disposition of all unsubscribed shares.)

Each of the retailer defendants receiving shares was required to deposit them for ten years in a separate trust, with full voting powers vested in separate trustees. Under the judgment, each of the retailer defendants was enjoined from having as an officer, director or employee any person who was also an officer, director or employee of the reorganized company and from exercising any right which it might acquire to vote for the election of any official of the reorganized company although such defendant was permit-

ted to "cause such right to be exercised independently by a financial institution or other party acceptable to plaintiff or approved by the Court." Similar limitations were imposed on those who might be employed by the reorganized Blue Chip.

Within 30 months after the reorganization, the reorganized Blue Chip was to present for the approval of the court a plan under which it would offer for sale one-third of its then existing business in California. This business was to be located within a contiguous area within Southern California. The decree set no limitation on the time by which the sale must be completed and the sale was conditioned upon certain requirements established by the court, referred to *supra*, fn. at p. 12. The court, as noted, foresaw that such sale might never take place and the State of California in its brief *amicus curiae*, filed May 29, 1967, in support of this judgment, emphasized that the judgment "does not mandate approval [of the sale]" or even "the effectuation of the sale." (Brief, p. 16).

The judgment contained general provisions enjoining the defendants from conspiring or from monopolizing the trading stamp business. It also included, *inter alia*, a prohibition against refusing to provide a trading stamp service to a retailer by reason of the rate at which he issued stamps, the use by the retailer of another stamp than Blue Chip, or the presence in the locality of another establishment using Blue Chip.

On May 17, 1967, Thrifty Shoppers, pursuant to leave granted, filed a brief *amicus curiae* opposing entry of the proposed judgment.

On June 5, 1967, the court heard oral argument by Thrifty Shoppers and others, and thereupon entered the proposed judgment. In response to Thrifty Shoppers' counsel's statement of the serious economic injury which would be done to

small trading stamp companies under the judgment, the district judge stated: "[T]here is a business in California which is more important than the stamp industry, and that is the grocery industry" and "I will do all I can to preserve competition in the stamp industry but I will not do it at the risk of an industry which is more important to the economy of the State of California than the stamp industry." (Tr., June 5, 1967, pp. 46-47).

On July 12, 1967, Thrifty Shoppers filed a motion for an order granting it the right to intervene and for an order vacating the judgment. On August 3, 1967, this motion was denied by the court.

THE QUESTIONS ARE SUBSTANTIAL

As the district judge recognized, the case and the decree which he entered are of great economic importance:

> "It appears that the case, without any question, is a case of unusual quality. The economic ramifications are probably greater within a narrower geographical aspect, however, than any like case that has been presented before, because the case not only concerns a monopoly within the trading stamp industry in California, but whatever is done by this court will have a tremendous impact upon the economy of the State, not only the economy of the S&H and any trading stamp companies that want to come in but upon the entire retail, wholesale and consumer industry." (Tr., December 15, 1966, p. 402-403).

The legal questions presented are no less significant. Here competitive retail grocery chains, doing more than $1,500,000,000 annual business, have been engaged in an unlawful horizontal joint venture. As in *United States v. Sealy, Inc.*, ... U.S. ....., decided June 12, 1967, 1967 Trade Cas., ¶ 72,125, the defendants have utilized as their instru-

mentality a corporation, here Blue Chip Stamp Company, organized by them and controlled and operated by them, for the purpose of carrying out an "aggregation of trade restraints." Just as in *Sealy,* these defendants have owned substantially all of the stock of Blue Chip Stamp Company, controlled its board of directors and exercised dominion over the operations of the company. The Government's complaint alleged, and the record on discovery demonstrated, that the chain defendants had agreed upon the terms and conditions upon which Blue Chip stamps would be used by them and by other retailers, that Blue Chip had achieved an overwhelmingly monopolistic position in the trading stamp business in California, and that the defendants engaged in *per se* violations of the antitrust laws, including a boycott of other trading stamp companies and limitation by agreement of the territories in which Blue Chip would be permitted to operate.

The language of *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), in describing the facts of that monopoly is directly apposite here. The Court said that the offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. In *Grinnell,* the Court had no problem "as what was done in building the empire was done plainly and explicitly for a single purpose." The same is even more true here—where the defendants formed and operated a corporation to accomplish their purpose of monopolizing the trading stamp business. In *Grinnell,* the Court said that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market" and referred to the 87 percent of the business held by the defendants and the fact that "they did not hesitate to wield"

their power. Here, the defendants clearly had a predominant share of the market—running to 76.2 percent in California and 86.4 percent in the Los Angeles area—and the record shows that they didn't hesitate to wield their power to, among other things, boycott other trading stamp companies and to control by agreement the terms and conditions upon which they would use Blue Chip stamps and the areas in which they would use them.

This Court has said that a decree should

> "(1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) 'break up or render impotent the monopoly power which violates the act'."

International Boxing Club of N.Y. v. United States, 358 U.S. 242, 253 (1959). None of these prerequisites has been met by this decree. The monopolistic combination and its power have been preserved by tying to Blue Chip by stock ownership not only the defendant retailers but also the thousands of other retailers who have been using Blue Chip stamps and who now would be afforded the opportunity under the decree of owning stock and debentures in Blue Chip. The defendants have been permitted to retain stock in Blue Chip in proportions which will insure their ability to control the corporation, particularly since present Blue Chip management, whom they installed, will not only remain but will receive considerable stock. The defendants are being permitted to continue to use Blue Chip stamps and to reap enormous profits which, through their conspiracy, now inhere in the name "Blue Chip".

In short, this case is one in which (a) the established facts of record are flagrantly violative of the antitrust laws and (b) the decree entered by the lower court on its face leaves in being a monopolistic combination. Under those

circumstances, such discretion as may reside in the Department of Justice in negotiating consent judgments has no application. An antitrust decree, simply because it has been entered by consent, cannot ignore the principles announced by this Court (and, in this case, at an earlier stage espoused by the Government*) for the dissipation of monopolistic power. This is not a case in which a third party is seeking to intervene to ask one type of relief in preference to another; it is instead one in which the standards laid down by this Court have been rejected.

1. The threshold question to be considered is whether Thrifty Shoppers had a right under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in the action for the purpose of seeking to set aside the inadequate decree and of appealing from it. Rule 24(a)(2), as amended, provides that there may be intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

An applicant for intervention must, first, claim that he has "an interest relating to the property or transaction which is the subject of the action." The transaction which is the subject of the action herein is the conspiracy in which defendants engaged and the operation of the trading stamp company which they unlawfully formed. The Government

*In its memorandum filed on November 28, 1966, relating to an earlier decree, the Government said that it had "refused to settle, as originally requested by defendants, on any terms which would not guarantee to the public that Blue Chip's illegally-acquired monopoly be dissipated" and that it would not settle the case on terms to permit Blue Chip "to maintain its illegally-acquired monopoly position" or "to transfer such monopoly position * * * to * * * wholesale and retail grocers." (p. 9).

alleged that one of the effects of defendants' offenses was that "[t]rading stamp companies which have competed with or which desire to compete with Blue Chip in the trading stamp business in California have been denied the opportunity to do so in a competitive market." (Complaint, ¶ 27(d)). Since Thrifty Shoppers is one of the trading stamp companies which have attempted to compete with Blue Chip and which will be affected by the decree which insures the continued monopoly of Blue Chip, it clearly has an interest relating to the transaction which is the subject of the action. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129.

Second, a showing must be made that the prospective intervenor "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." In 1966 the Advisory Committee when making a revision of Rule 24(a) said, *inter alia*:

> "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene * * *."

Because the decree preserves defendants' monopoly in the trading stamp business in California, it will impair Thrifty Shoppers' ability to continue in existence and will substantially affect its business. In the private action which it has brought against the defendants herein, Thrifty Shoppers has sought the relief denied by the court below. While the present decree will not be legally binding in that private action, nevertheless, as a practical matter, there is little likelihood that the same court which rejected even the limited relief sought in the decree lodged on October 28, 1966, will grant more effective relief in a private action.

As the court pointed out in *Sam Fox Publishing Company v. United States*, 366 U.S. 683, 694 (1961):

> "* * * there is considerable weight to the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree."*

Third, the applicant must show that his interest is not "adequately represented by existing parties." The best evidence of this inadequate representation by the Government is the decree to which it consented; as is demonstrated, the decree totally fails to restore competition in the trading stamp industry in California.

Fourth, the application for intervention must be "timely". The purported tardiness of Thrifty Shoppers and the other applicants in filing their motions for intervention was one of the principal reasons given by the court for denying the applicants' right of intervention. This basis for the trial court's action is without foundation. It is established that intervention may be allowed after entry of a final decree. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129; *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502; Barron & Holtzoff, *Fed. Prac. & Pro.*, Vol. 2, ¶ 594. In the circumstances of the instant case, any prior application would have been premature and would have had no practical effect. On April 28, 1967, the present final judgment was lodged with the court. Non-parties who objected to the decree were granted

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*In the *Sam Fox* case intervention as of right was denied on the ground that Rule 24(a) then provided that to secure intervention as of right the applicant must show that it "is or may be bound by a judgment in the action." The rule, however, no longer requires a showing that the judgment be binding; it is sufficient that the applicant demonstrate "that the disposition of the action may *as a practical matter* impair or impede his ability to protect [his] interest." (Emphasis added.)

the right to file briefs *amici curiae* under the procedure followed by the trial court. On May 17, 1967, Thrifty Shoppers filed (and served on the Government and all other parties) a brief *amicus curiae* setting forth its objections to this proposed judgment and on June 5, 1967, argued orally before the court in opposition to the decree. Its arguments were rejected and the final judgment was entered on that date. The district court noted in its opinion that the applicants had "been given every opportunity to be heard" with respect to the final judgment. If Thrifty Shoppers' arguments had been successful, there would of course have been no need to intervene. Intervention became a necessity only after the decree was entered. Thrifty Shoppers filed its motion to intervene and to vacate the judgment on July 12, 1967, and the motion was denied by minute order of July 31, 1967, and by formal order of August 3, 1967, all of which dates were within the sixty-day period during which a party may appeal from a final judgment in an antitrust proceeding such as this one. Thrifty Shoppers' motion was also filed prior to the submission by the defendants on August 3, 1967, of a plan of reorganization as required by ¶ V of the June 5th final judgment. Thrifty Shoppers filed its notice of appeal on August 4, 1967. The fact that Thrifty Shoppers did not file its motion at an earlier stage has therefore caused no delay or prejudice to the proceeding or to any party.

2. The thrust of the position adopted by the district judge in rejecting the October 28, 1966, decree and in prescribing the terms of and approving the decree entered June 5, 1967, was that notwithstanding the illegality of Blue Chip, which, as noted *supra*, at p. 6, the court expressly assumed, nevertheless Blue Chip must be perpetuated since the district judge considered the stamps which it issued to be essential to the survival of the smaller retail

firms which competed with the retailer defendants. He appeared clearly to deem it not significant that as a result of the continuation of the Blue Chip monopoly competitors in the trading stamp industry would have little chance for survival. The record is void of support for his assumption and crucial determination that the preservation of Blue Chip is essential for the survival of smaller retail grocery stores. But even if there were factual grounds for this position there is no possible legal basis for his conclusion that a monopoly in one industry may be justified by the purportedly desirable economic effects which it may have in another. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) the court pointed out that an otherwise unlawful merger:

> "* * * is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A choice of such magnitude is beyond the ordinary limits of judicial competence * * *."

See also *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U.S. 219, 242-243 (1948).

The essence of the district court's position was that if a monopoly in one industry has become so all-embracing that to bring it to an end may in some degree have adverse consequences upon some competitors in another industry (at least until the evils brought on by the monopoly have been rooted out) then the monopoly must be left in being. This approach cannot be squared with *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), in which, in response to the argument of "possible harsh consequences" which would accompany complete divestiture, this Court said that "[i]f our examination persuades us that the remedy decreed leaves the public interest in the elimi-

nation of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error."

The Government, in its memorandum filed on November 28, 1966, in support of the proposed decree lodged on October 28, 1966, had rejected the very grounds on which the court later relied in approving the decree. It stressed that the

> "* * * contention that an illegally acquired monopoly position in the trading stamp business should be allowed to exist because of * * * speculations as to what the effect of competition in the trading stamp business might be on competition in the grocery business is inconsistent with all of the [cited] cases and the only other [relevant cases] * * *." (p. 9).

This position was abandoned by the Government when it consented to the decree entered on June 5, 1967.

3. As the result of the court's incorrect conclusions as to the legal standards to be applied in fashioning relief in antitrust cases brought by the Government, it prescribed and approved a decree which was patently inadequate to dissipate the monopoly whose illegality was assumed and in so doing failed to comply with the minimum requirements for an antitrust decree which have been established by this Court. To the contrary the lower court placed its imprimatur upon the unlawful combination of Blue Chip, virtually guaranteeing its continuing existence.

First, the retailer defendants have been permitted under the decree to retain an ultimate stock interest of 40.5 percent in Blue Chip and, as noted earlier, during the initial period of reorganization considerably in excess of that amount. This Court said in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 190 (1944):

> "The fact that the companies were affiliated induced joint action and agreement. Common control was one

of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunities for these exhibitors to continue to act in combination against the independents."

The fact that the shares will be placed in separate voting trusts for ten years can have little practical effect on the exercise of control by the defendant stockholders. The lawful obligation of the trustees will be to protect the interests of the companies to whom they are accountable. The inadequacy of a trustee as a device to insulate a corporation from the control of the beneficial holders of its stock was recognized by the Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), where the Court stated that even though the trustee, there the chief executive of the company, "is subject to the ultimate control and supervision of the District Court, there is danger that he may vote the new company stock in a manner calculated to perpetuate the very conditions which led us to order severance of the illegal combination." The instant case is even more disturbing than *Cascade*. Here, the trustees would be financial institutions which would not be in a position to make independent judgments in exercising voting rights. By necessity they would be forced to seek the advice of the beneficial owners before casting their votes. The defendant retailers are neither forbidden to attend stockholders meetings nor to consult with the trustees. Moreover, control over a corporation does not rest alone in the voting of stock; a businessman's wishes as to how his corporation will conduct its business may be made known in myriad ways other than by voting his stock. Thus, *United States v. E. I. du Pont de Nemours*, 366 U.S. at 332, pointed out that the power to sell stock, such as exists under the Blue Chip decree, can be used coercively.

The general injunctive provisions in this decree are not adequate to deal with this threat. This Court in *du Pont*, 366 U.S. at 333-334, said that the public interest should not "be required to depend upon the often cumbersome and time-consuming injunctive remedy."

Second, defendants will be free to continue to use Blue Chip stamps. It seems apparent that, since they will continue to be substantial shareholders of Blue Chip, the possibility is remote that they will transfer their trading stamp patronage to an independent trading stamp company. That the defendants will use no stamp other than Blue Chip is indicated by the fact that with minor exceptions they have used no stamps other than these since the inception of Blue Chip. (See plaintiff's answers to second set of interrogatories propounded to it by defendant Thriftimart, filed September 29, 1966, answer to interrogatory No. 36A and 36B, at pp. 118-119.) As a result of the inevitable use by defendants of Blue Chip stamps rather than any other stamp, Thrifty Shoppers and other competitors in the trading stamp business will be foreclosed from a high percentage of the trading stamp market in California.

Third, a large block of shares—which within several years will amount to approximately ten percent of the total—will be issued to management—some immediately and some under a stock option plan. Thus, the present management, which has faithfully carried out the defendants' wishes by serving as the agency responsible for building up the Blue Chip monopoly, will be richly rewarded for the part which it has played in building up the monopoly and will continue to direct the affairs of the corporation. The likelihood that management will continue to follow patterns established in the past in violation of law was noted by the Supreme Court in *United States v. E. I. du Pont de Nemours*, 366 U.S. at 332.

Fourth, approximately 45 percent of the shares of the new company to be formed will be made available in proportional amounts to the retailers who have used Blue Chip stamps. Since twenty-five firms account for over 50 percent of Blue Chip's sales, the effect will be to place an overwhelming share of ownership of the corporation in a handful of retail chains. Furthermore, the issuance of stock and the company's debentures to retailers who use Blue Chip will effectively tie to Blue Chip the additional thousands upon thousands of retail merchants in California who have been using Blue Chip during the past three years. The Government stated the infirmity in any such arrangement when in its November 28, 1966, memorandum it commented on the decree proposed by the State of California which would have vested control over the company and ownership of its assets in the retail grocers utilizing the Blue Chip service (at p. 30):

> "The State's proposed decree would be unacceptable to the Government because (a) it would transfer complete control and domination of the Blue Chip Stamp Company and the same monopolistic position presently enjoyed by Blue Chip Stamp Company from one group of grocers to an even larger and more potent group of grocer wholesalers and retailers, and (b) it would afford no opportunity for competitive trading stamp companies to come into the California market in a manner comparable to that provided by Section VIII of the proposed decree [lodged October 28, 1966]."

Fifth, the decree grants Blue Chip a period of 30 months after its reorganization within which to submit a *plan* for the sale of one-third of its then existing trading stamp business in California, with no time limit at all established for the subsequent carrying out of that plan and, as noted earlier, there is no certainty that there will be any sale

at all. The business to be divested must be within a contiguous area in *Southern* California. In *Purity Stores, Inc., v. Blue Chip Stamp Co., supra,* the court found that in 1963 Blue Chip had in excess of 75 percent of the trading stamp business in Northern California. None of that business need be divested, and Blue Chip will continue to occupy its monopolistic position in that area of California.

Of transcendent importance is the fact that the time period contemplated for this divestiture is inordinately long. Blue Chip has two and one-half years after reorganization simply to present a plan for divestiture. In estimating the total period of time which will elapse before the divestiture need be completed, it is necessary to add to the 30-month period the time required for the reorganization of Blue Chip, for the approval of the plan and for the divestiture itself. The need for "swift severance of the illegal combination" and for dissipation of the violation "with all convenient speed" which this Court found in *Cascade* is abundantly present here. Throughout the time that divestiture is delayed, Blue Chip will be able to expand its monopolistic position and to eliminate the possibility of any effective competition.

4. The fact that the decree was entered with the consent of the Government should not insulate the judgment from review by this Court. Particularly in antitrust matters, this Court is vested with the responsibility of determining for itself if the relief entered by the lower court, litigated or by consent, is in the public interest. In *E. I. du Pont de Nemours,* 366 U.S. at 324-325, the Court stated:

> "Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his [a single judge's] determination. This circumstance imposes a special burden

upon us, for, as Mr. Justice Roberts said for the Court, '***it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him,' Hartford-Empire Co. v. United States, 1945, 324 U.S. 570, 571, 65 S.Ct. 815, 817, 89 L.Ed. 1198, clarifying 1945, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322.

"These principles alone would require our close examination of the District Court's action." (Emphasis added.)

The necessity of careful review by the Supreme Court is of particular importance in this case because of the extensive role which the district court played in the formulation of the decree and by reason of the fact that the decree as entered contained provisions which the Government had earlier rejected as unacceptable because they would increase the potency of the monopoly.

CONCLUSION

The decree entered by the court is plainly inadequate to remedy the pervasive effects of the defendants' illegal monopolization of the trading stamp business in California. Thrifty Shoppers, which will be substantially affected by the decree, should have been permitted to intervene. The issues present substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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November, 1967.

(Appendices follow)